Supreme Court, U.S.
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In the Supreme Court of the United States

George W. Bush,

Petitioner,

v.

Palm Beach County Canvassing Board, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

REPLY BRIEF OF RESPONDENT BUTTERWORTH

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SUMMARY OF THE ARGUMENT

The text of 3 U.S.C. s. 5 does not support invalidation of the Florida Supreme Court's opinion. The purpose of the statute and the remedy plainly provided in the statute are limited. The objective is to confer immunity upon a slate of state electors chosen by laws enacted before the date of their choosing as long as any controversies surrounding selection occur by a fixed date. The effect of failing to comply with the statute is limited only to the loss of that immunity, and to the potential that the slate could be subject to objection before Congress under 3 U.S.C. s. 15. Giving the statute the expansive reading urged by the petitioner will result in an unwarranted intrusion on state sovereignty.

U.S. Const. Article II, section 1, cl. 2, granting states the power to determine the manner for choosing presidential electors, contemplates that such power will be exercised consistent with state constitutional provisions. The Constitution also contemplates state judicial review of the exercise of such state legislative power.

Invalidation of the Florida Supreme Court's opinion is unwarranted, particularly when the state legislature provides for the choosing of presidential electors through general elections laws that apply to all elections. By doing so, the Legislature understood that such laws were subject to state judicial review and to the broad equitable powers of state courts to fashion remedies to protect voters' rights. Further, the Legislature has acquiesced to decades' old judicial interpretations that state elections laws would be liberally interpreted in order to protect voting rights and that elections statutes would be treated as "directory" rather than "mandatory."

The Florida Secretary of State's assertion that she, not the Florida Supreme Court, is the only entity authorized to interpret Florida elections law is wrong.

REASONS FOR AFFIRMING THE DECISION BELOW

> I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense "make" law. But they make it *as judges make it*, which is to say *as though* they were "finding" it — discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be.
>
> Justice Scalia, concurring, *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Emphasis in original).

I. THE TEXT OF 3 U.S.C. S. 5 DOES NOT SUPPORT NULLIFICATION OF THE FLORIDA SUPREME COURT'S OPINION.

The text of 3 U.S.C. s. 5 does not support invalidation of the Florida Supreme Court's opinion. The section's purpose is limited, and plainly spells out the consequences for failing to comply with it.

Section 5's plain language makes clear that Congress' purpose in enacting the statute was to confer immunity on a properly certified slate of electors from objections lodged in Congress[1]:

[1] 3 U.S.C. s. 15 sets out the process for resolving controversies concerning and objections to electors. This section must be read with section 3.

§ 5. Determination of controversy as to appointment of electors

> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, **shall be conclusive**, and **shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.**

(Emphasis added.)

If a slate is selected within the prescribed time (all contests and controversies, judicial or otherwise having been timely resolved) and under law "enacted" before the date for choosing the electors, it is conclusively deemed to be the slate entitled to cast ballots for the state. In other words, the slate is immune from challenge to its right to cast presidential ballots on behalf of a state.

The point of the statute is to provide a means for addressing situations in which more than one slate of electors, claiming to represent the same state, send ballots to Congress. Even the

petitioner explicitly recognizes this in his discussion of the rationale for section 5:

> As Representative William Craig Cooper of Ohio explained in the congressional debate on this statute (Act of Feb. 3, 1887, ch. 90, s. 2 24 Stat. 373), "these contests, **these disputes between rival electors, between persons claiming to have been appointed electors,** should be settled under a law made prior to the day when such contests are to be decided." 18 Cong.Rec. 47 (Dec. 8. 1886) (remarks of Rep. Cooper). *See also id.* ("these contests should be decided under and by virtue of laws made prior to the exigency under which they arose").

Petitioner's brief p. 18. (Emphasis added.)

This limited congressional intent should not yield the broad consequences the petitioner envisions. Limited objectives, particularly when they are limited as in the statute, have limited consequences. The only statutory remedy for a departure from the section's requirements is the loss of any immunity the slate of electors chosen by a deviating state might have enjoyed from a challenge in Congress under 3 U.S.C. s. 15. The statute contemplates no other result and provides no textual basis for the massive intrusion into state sovereignty and the injury to federalism that the petitioner demands.

The petitioner's argument that the Florida Supreme Court's opinion somehow "frustrates Congress' carefully orchestrated procedures"[2] for resolving controversies among competing electors is contrary to section 5's plain language.

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[2] Petitioner's brief p. 30.

In reality, the petitioner asks the Court to inject itself into the "manner" of choosing electors, a state matter under U.S. Const. Article II, section 1, cl. 2. The law applying to the method and the process of choosing electors is solely and uniquely a *state* matter. U.S. Const. Article II, section 1, cl. 2.; *McPherson v. Blacker*, 146 U.S. 1 (1892).[3] The powers of both Congress and this Court are constitutionally limited to the resolution of finite federal questions. The issue, here, however, a legal dispute over the manner and method for choosing presidential electors, involves questions of state law alone. The petitioner suggests that federal intervention into a dispute concerning the manner and method of choosing the President is warranted under some general power to nullify state laws or judicial opinions that interfere with a state official carrying out a federally mandated duty. Petitioner's brief p. 30-31. But Article II expressly confers plenary power on a state to determine the manner and method of choosing electors, and the Constitution contemplates the failure of a state to choose them and provides a procedure when a state fails to appoint electors: the election goes on without them. U.S. Const., Twelfth Amendment. This may seem harsh, but it is the balance the Founders struck between the desire to delegate to the states the

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[3] The two cases the petitioner cites as authority for federal power to intervene in federal elections are inapplicable. *Burroughs v. U.S.*, 290 U.S. 534 (1934), involved a prosecution under the Federal Corrupt Practices Act. It is not unreasonable, unconstitutional or contrary to principles of federalism for Congress to punish corrupt practices concerning elections of federal officials. That does not involve the manner of electing a president. *Buckley v. Valeo*, 424 U.S. 1 (1976), dealt with the public financing of provisions of the Federal Election Campaign Act. Whether a presidential campaign is publicly funded does not concern the manner or method for choosing a president.

duty to elect the President and the need for finality in the election. In fact, during the first presidential election, the New York legislature deadlocked over elector selection and the state appointed no electors. *McPherson*, 146 U.S. at 30. Because the Constitution provides the remedy for a state's failure to appoint electors, intervention in a state legal dispute over such appointments is not supported by any federal interest.

Because the manner of choosing presidential electors is a state matter, it would be improvident to use section 5 to reach deep into that process to nullify a state elections law decision merely because it affected a presidential contest. Section 5 activates only when qualified electors — or electors claiming to be properly qualified — deliver their votes to Congress to be acted upon under section 15 and the Twelfth Amendment to the Constitution.

Therefore, the plain text of the statute, the Constitution and the fabric of federalism do not support nullification of the Florida Supreme Court's opinion. The only thing this Court can do if it finds that the Florida Supreme Court's opinion deviated from the requirements of section 5 is to declare that any slate certified pursuant to that opinion is not entitled to the immunity under congressional scrutiny that the statute confers.

II. ARTICLE II, SECTION 1 DOES NOT PERMIT THE IMPOSITION OF BURDENS ON VOTING, IMPAIR STATE JUDICIAL REVIEW, SUPERSEDE THE REQUIREMENTS OF THE FLORIDA CONSTITUTION, OR PERMIT LAWFULLY CAST VOTES TO BE IGNORED AND INACCURATE VOTE TABULATIONS TO DETERMINE THE OUTCOME OF AN ELECTION.

The petitioner's argument is premised upon a notion that, pursuant to U.S. Const. Article II, section 1, cl. 2, state legislatures have been delegated the constitutional authority to ignore lawfully cast votes and to eliminate the ability and the right of local election officials to correct inaccurate counts by the imposition of deadlines for the submission of vote tabulations from county canvassing boards. The petitioner's initial brief argues that prior precedents of this Court support the proposition that review and interpretation of elections laws concerning the manner in which electors are appointed by the judiciary of a state constitutes a violation of the *exclusive* jurisdiction of state legislatures over such matters in violation of the Constitution. The petitioner contends that Article II, section 1 permits state legislatures to enact statutes concerning the appointment of electors outside the confines of state constitutional constraints and beyond the jurisdiction of state courts to review. However, the authorities upon which the petitioner relies are inapplicable.

The petitioner's reliance on *McPherson v. Blacker*, 146 U.S. 1 (1892) is particularly misplaced. Perhaps no prior precedent of this Court more plainly establishes the jurisdiction of the judiciary, both at the state and federal levels, to interpret laws concerning a state legislature's directions regarding the manner

of appointing electors. The petitioner argues that *this Court* "has explained" in *McPherson v. Blacker*, 146 U.S. at 35, that, when directing the manner of choosing presidential electors, state legislatures are not bound by their state constitutions. Petitioner's brief p. 47.[4] However, this Court has never "explained" any such thing. The passage in the *McPherson* opinion is from a May 28, 1874 report by Senator Morton, chairman of the senate committee on privileges and elections, recommending an unsuccessful amendment dividing the states into electoral districts. The passage does not contribute to the holding of the case, and there is no indication that this Court approved of it. *Id.*, pp. 34-35.

Contrary to the petitioner's assertions, *this Court* made clear in *McPherson* that it is an appropriate and expected role of the state judiciary to interpret and review even those laws enacted by state legislatures that concern the manner in which electors are appointed. The issue in *McPherson* was whether U.S. Const. Article II, section 1, cl. 2 authorized states to choose electors in district elections rather than statewide. The case came to the court *after* review and determination by the Michigan Supreme Court on the validity of the statute.

In *McPherson*, this Court looked to the constitution of the state of Michigan in analyzing one of the provisions of the

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[4] The petitioner specifically states:

> As this Court has explained, "[t]his power [to determine the manner of appointing electors] is conferred upon the legislatures of the States by the Constitution of the United States, *and cannot be taken from them or modified by their State constitutions. McPherson,* 146 U.S. at 35 (emphasis added [in Petitioner's Brief].)

Petitioner's Initial Brief, p. 47.

statute rejected by *both* the supreme court of Michigan *and* this Court. Had this Court believed that neither the state constitution applied nor the state judiciary had jurisdiction to interpret and review the validity of a statute enacted in pursuit of a state legislature's authority under Article II, section 1, cl. 2, this Court would have so stated in ruling on the challenge to the Michigan supreme court's holding. However, rather than holding that the state court lacked jurisdiction over such matters, this Court *affirmed* the state supreme court's order — including the part of the state elections statute the state court had invalidated. *McPherson v. Blacker*, 146 U.S. at 41, 42.[5]

Likewise, the petitioner's reliance on *Williams v. Rhodes*, 393 U.S. 23 (1968), and *Anderson v. Celebrezzee*, 460 U.S. 780 (1983), is misplaced. Both cases speak to the limits imposed by state constitutional provisions on the exercise of state legislatures' authority to direct the manner of choosing electors. Both cases make clear that the power of states to select electors to choose the President and Vice President cannot be exercised in such a way as to violate express constitutional commands. Both cases hold that, while Article II, section 1 grants extensive powers to states to pass laws regulating the selection of electors, the provision does not give states power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions. *Williams v. Rhodes*, 393 U.S. at 28-29; *Anderson v. Celebrezzee*, 460 U.S. at 794-795, 806.

In light of the petitioner's awareness of these precedents of the Court, it is difficult to understand their challenge to the Florida Supreme Court's opinion. Or, more accurately stated, it is difficult to understand Petitioner's Article II, section 1 challenge to the Florida Supreme Court's *jurisdiction* to issue

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[5] "We entirely agree with the supreme court of Michigan . . . and are of the opinion that the date may be rejected, and the act held to remain otherwise complete and valid."

its opinion, which is purportedly the basis for the petition before this Court. These precedents support the Florida judiciary's role in interpreting the election laws of the State of Florida – even laws which implicate the appointment of electors. These precedents acknowledge the application of state constitutions in the analysis of laws directing the manner of appointment of electors. These precedents support the conclusion of the Florida Supreme Court that such statutes cannot impose burdens on the right to vote through the application of statutory deadlines.

As noted in Respondent Butterworth's initial brief, Florida courts generally give a liberal construction to statutes relating to elections, "in favor of the citizen whose right to vote they tend to restrict and in so doing to prevent disenfranchisement of legal voters and the intention of the voters should prevail when counting ballots. . . ." *State ex rel. Carpenter v. Barber*, 144 Fla. 159, 198 So. 49, 51 (Fla. 1940). For this reason, despite the inclusion of words like "shall", the courts have traditionally determined statutory restrictions, such as a requirement that the voter place a cross mark *before* the name of the candidate of his choice, is not a "mandatory statute" but is a formal or "directory statute" and does not prevent the counting of the vote of a voter who fails to comply with the statute where the intention of the voter can be ascertained from a study of the ballot and the vote counted. *State ex rel. Carpenter v. Barber*, 198 So. at 50-51 (vote counted, especially where the cross mark is on the right of the name of the candidate rather than on the left).

Florida law has long recognized, in the context of elections, the continuing duty of elections officials to correct inaccurate vote tabulations and the *equitable power* of the Florida courts, through exercise of their state constitutional power, to fashion

remedies in elections cases, such as by use of writs of *quo warranto* and *mandamus*.[6]

Significantly, the Florida Supreme Court held in 1932, in *Wiggins v. State ex rel. Drane,* 106 Fla. 793, 144 So. 62, 64 (Fla. 1932) that:

> The legal predicate for the issuance of a writ of mandamus to have a recount is therefore that there is an unperformed duty mandatory in its character and continuous in nature until performed, which requires election inspectors to make a correct count and proper return of the votes cast, regardless of what may be the result, and that until this duty is performed according to law there is no *legal* result, although some de facto result may be arrived at and declared on the basis of irregular count or improper return.

(Emphasis in original).

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[6] *Schneider v. Lang*, 66 Fla. 492, 63 So. 913 (Fla. 1913); *State ex rel. Knott v. Haskell,* 72 Fla. 176, 72 So. 651 (1916); *State ex rel. Spears v. Baggett*, 77 Fla. 92, 80 So. 743 (Fla. 1919) (Mandamus lies to compel the performance of the ministerial duty to correctly canvass election returns as made.); *State ex rel. Nuccio v. Williams,* 97 Fla. 159, 120 So. 310 (1929) (Mandamus is appropriate remedy in case election ballots were not correctly and accurately counted, tabulated, or returned); *State ex rel. Peacock v. Latham*, 125 Fla. 793, 170 So. 475 (Fla. 1936) (Mandamus held to lie to compel board of county commissioners to reprint ballots and substitute the candidate whom recount and recanvass showed was nominated in primary, ***notwithstanding that the name of such nominee had not been certified and filed with the board within the time required by statute.***).

Here, the petitioner erroneously asserts to this Court that the Florida Supreme Court "changed" the law and altered the outcome of the certified vote tabulation by its exercise of equitable powers in the order before this Court. The petitioner represents that an order "reversing" that order by this Court will *return* the vote to where it stood on November 14, 2000 – nullifying the hundreds of votes counted during the manual recounts conducted since November 14, disenfranchising hundreds of Florida citizens because their votes were counted *after* the statutory deadline. However, no reading of more than a century's worth of Florida law can lead to the result advocated by the petitioner.

Precedents of this Court establish that Article II, section 1 does not give state legislatures the power to impose burdens on the right to vote, including imposition of inflexible statutory deadlines. *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564 (1983) (statute requiring independent candidate for office of President to file statement of candidacy and nominating petition in March in order to appear on general election ballot in November placed unconstitutional burden on voting and associational rights of supporters of independent candidate).[7] Florida precedents and the express mandates of the Florida Constitution establish that, even in the absence of a statutory remedy, mandamus will lie to require election officials,

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[7] "But, as we have emphasized, 'we must reject the notion that Article II, s 1 gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions.'. *Williams v. Rhodes, supra,* 393 U.S., at 29, 89 S.Ct., at 9." *Anderson v. Celebrezze,* 460 U.S. at 1587, f.n. 18.

including the state canvassing board, to count all ballots cast in which the voter's intent can be ascertained.[8]

Because the Florida courts' power to rectify and compel correction of inaccurate vote tabulations is conferred by the Florida Constitution,[9] their power cannot be enlarged or abridged by the Legislature. *State ex rel. Buckwalter v. City of Lakeland*, 112 Fla. 200, 150 So. 508, 512 (Fla. 1933); *State v. Jefferson*, 758 So.2d 661 (Fla. 2000) ("'While constitutional jurisdiction cannot be restricted or taken away, it can be enlarged by the Legislature in all cases where such enlargement does not result in a diminution of the constitutional jurisdiction of some other court, or where such enlargement is not forbidden by the Constitution.' [citations omitted]").

For these same reasons, the petitioner's attack on the deadline the Florida Supreme Court set for the filing of recount returns must fail. The Florida Supreme Court, like any state court, exercised its inherent equitable powers to remedy a threat to fundamental constitutional rights. This Court has recognized the ability of state courts to exercise such equitable remedial powers. *See McDaniel v. Barresi*, 402 U.S. 39 (1971) (student assignment plan involving transportation of African-American

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[8] *Ex parte Beattie,* 98 Fla. 785, 124 So. 273, 274 (Fla. 1929) (Statutory method for contesting elections held not exclusive of common-law remedies of *quo warranto* and mandamus.); *Farmer v. Carson*, 110 Fla. 245, 148 So. 557, 559 (Fla. 1933) (Purpose of statute authorizing election contest is not to supersede *quo warranto* proceedings, but to afford simple and speedy remedy).

[9] Art. V, section 3(b)(8), Fla. Const.(jurisdiction of the Supreme Court of Florida); Art. V, section 4(b)(3), Fla. Const. (jurisdiction of the district courts of appeal); Art. V, section 5(b), Fla. Const. (jurisdiction of the circuit courts).

students to achieve greater racial balance in school system was a valid exercise of state authority)

The petitioner's claim that the Florida Constitution does not apply in matters relating to the grant of authority in Article II, section 1 or the exercise of the state Legislature's duties in matters relating to the appointment of electors is fundamentally flawed. In addition to precedents of this Court such as *Smiley v. Holm*, 285 U.S. 355 (1932), the petitioner ignores the fact that the members of the Florida Legislature derive their power and authority from the state constitution in the first place. Each member of the Legislature has taken an oath to support, protect, and defend that constitution in the faithful performance of their duties[10] and each member's authority to act springs from the grant of power from the state constitution.

In sum, the Florida Supreme Court's decision and its remedy were anticipated by the Florida Legislature and were consistent with U.S. Const. Article II, section 1, cl. 2. Nullification of its judgment is unwarranted, and an unreasonable and unnecessary intrusion on state sovereignty.

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[10] *See* Art. II, section 5(b), Fla. Const.

III. THE SECRETARY OF STATE IS NOT THE LAST WORD ON THE INTERPRETATION OF FLORIDA LAW.

The Secretary of State argues that she, not the Florida Supreme Court, is the sole authority on Florida election law, and that because the Florida Supreme Court disagreed with her, its opinion is void.[11] She cites no authority for this proposition, because there is none.

Although Florida administrative agencies have some power to interpret statutes, the courts are the final authority on the meaning of statutes. *Legal Environmental Assistance Foundation Inc. v. Board of County Commissioners of Brevard County*, 642 So. 2d 1081, 1083-1084 (Fla. 1994). While an administrative construction of a statute may be entitled to deference, that deference is not absolute; if the administrative construction is contrary to legislative intent, for instance, it will not survive judicial review. *Id.* For example, Florida courts have disregarded interpretations of elections law by the Division of Elections when they were contrary to law. *Nikolits v. Nicosia*, 682 So. 2d 663, 666 (Fla. 4th DCA 1996). The same general rules apply in the federal system. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446-447 (1987); *Chevron U.S.A. Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984); *Food and Drug Administration v. Brown and Williamson Tobacco Corp.*, 120 S.Ct. 1291, 1297 (2000).

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[11] The Secretary also disputes the Attorney General's opinion, suggesting that he has no authority to express opinions about elections matters. But the Florida Attorney General is constitutionally endowed with broad powers. He is the chief legal officer of the state, and constitutionally and statutorily authorized to render opinions on any subject. Art. IV, section 4(c), Florida Const.; section 16.01(3), Florida Statutes.

Finally, it is worth noting that the Secretary's position is internally inconsistent. The Secretary published her opinions — the first on the subject — *after* the date of the election, an act she claims is contrary to 3 U.S.C. s. 5.

CONCLUSION

For these reasons, Respondent Butterworth asks the Court to find the Florida Supreme Court's opinion to be consistent with section 3 U.S.C. s. 5 and to affirm the decision against the claim it violates section Article II, section 1, clause 2 of the U.S. Constitution and the substantive due process clause of the Fourteenth Amendment.

RESPECTFULLY SUBMITTED,

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